NOS. 83-333 and 83-344
IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1983

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C.P. CHEMICAL COMPANY, INC.,
Appellant,
v.
COMMISSIONER OF PUBLIC HEALTH,
Appellee.

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THE FORMALDEHYDE INSTITUTE,
INC., ET AL.,
Petitioners,
v.
BAILUS WALKER, JR.,
Respondent.

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On Appeal From and Petition For
A Writ of Certiorari to the Supreme
Judicial Court of Massachusetts

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# MOTION TO DISMISS APPEAL AND BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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## QUESTION PRESENTED

Should this Court review a state court decision that Department of Public Health regulations banning sale or use of a potentially hazardous product were within the Department's statutory authority, were a rational means of protecting the public health, and did not violate any constitutional rights of the industry involved?

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

Miscellaneous

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The Massachusetts Commissioner of Public Health (the "Commissioner"),[1/]

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1/ Bailus Walker, Jr. has succeeded Alfred Frechette as Commissioner, and so he is substituted as appellee-respondent. Supreme Court Rule 40.3.

defendant and successful appellant below, submits this motion to dismiss the appeal filed by C.P. Chemical Company, Inc. ("C.P. Chemical") and opposition to the petition for certiorari filed by the Formaldehyde Institute, Inc. and Borden, Inc. ("Borden").

STATEMENT OF THE CASE

The following supplemental statement of the case is drawn from the decision below, Borden, Inc. v. Commissioner of Public Health, 388 Mass. 707 (1983). In the summer of 1978 the Commissioner began investigating possible public health consequences of the release of formaldehyde from urea formaldehyde foamed-in-place insulation ("UFFI").[2/] Borden Appendix

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2/ UFFI contains three principal ingredients, one a urea-formaldehyde foam

(footnote continued)

A.7 ("B.A.7"). In March of 1979, he heard two days of testimony for and against regulation of UFFI. B.A.8. In November he issued regulations declaring formaldehyde and UFFI to be toxic and hazardous substances, banning the sale of UFFI, and requiring its repurchase in certain circumstances.[3/] Id. In November of 1980 he issued revised repurchase regulations narrowing the class of persons entitled to repurchase of UFFI and establishing a "referee" procedure to decide repurchase claims. Id.

Several UFFI manufacturers and distributors including Borden and C.P.

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(footnote continued)

made from formaldehyde, a potentially toxic gas. B.A.6-7. UFFI is mixed at the job site and pumped into walls to be insulated. Id.

3/ Repurchase involves removing cured UFFI from between walls.

Chemical challenged the original and revised regulations in a Superior Court trial which lasted over nineteen days in September and October, 1981. B.A.10. The trial judge excluded evidence offered by the Commissioner concerning the carcinogenicity of formaldehyde. Id. On January 18, 1982, the trial judge invalidated the UFFI regulations, but his decision was stayed pending appeal. B.A.10-11.

In April 1983, the Supreme Judicial Court reversed. It held that there was no right to an adjudicatory hearing before issuance of the UFFI regulations but that due process requires an adjudicatory hearing before any specific supplier is ordered to repurchase UFFI from a specific consumer. B.A.11-17. The court next held that the industry had failed to meet its burden of proving that the regulations lacked a rational basis.

B.A.17-28. It upheld the repurchase provisions of the UFFI regulations against due process and statutory attack, B.A.28-31, upheld the categorization of C.P. Chemical's "Tripolymer" as UFFI, B.A.31-33, rejected claims that the Commissioner was biased, B.A.33-35, upheld the Commissioner's claim that the carcinogenicity evidence had been wrongly excluded, B.A. 35-37, and rejected C.P. Chemical's preemption, due process, vagueness, and impairment of contract claims. B.A.37-38.[4/] This appeal and petition for certiorari followed.[5/]

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4/ The court did not discuss the Commerce Clause argument C.P. Chemical seeks to raise here. Jur. Stat. at 22-29.

5/ C.P. Chemical and Borden were separately represented in both the Superior and Supreme Judicial Courts and have filed separate requests for review.

(footnote continued)

## REASONS WHY THE WRIT SHOULD BE DENIED AND THE APPEAL DISMISSED

### I. THE INDUSTRY HAS NOT BEEN DENIED ITS RIGHT TO SUBSTANTIVE DUE PROCESS.

At the heart of the industry's briefs is the veiled claim that it was a mistake to ban UFFI and this Court should reverse that decision.[6/] Stating that position virtually suffices to rebut it. The industry's briefs either ignore or misapply Minnesota v. Cloverleaf Creamery Co.,

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(footnote continued)

Since only one decision is sought to be reviewed, the Commissioner believes only one brief is necessary and so, upon the informal advice of the Clerk's Office, he has combined his replies to C.P. Chemical and to Borden here. The Commissioner distinguishes between C.P. Chemical and Borden only where necessary in discussing specific arguments; otherwise they are collectively referred to as the "industry".

6/ See e.g. C.P. Chemical Jurisdictional Statement at 17-22; Borden Petition at 18-22, and 3, n.4.

449 U.S. 456 (1981) which outlines the proper mode of review for substantive due process challenges in the economic area.

In Cloverleaf and here, the industry attempted to prove at trial that there was no rational connection between "legitimate" legislative goals[7/] and the particular means chosen to achieve them. Id. at 462-63. In Cloverleaf the Court held that constitutional review of such a claim does not require that the state's choice of means is "sensible" (449 U.S. at 469) but only that that choice has not been shown to be irrational. So

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7/ Here the Commissioner acted under Mass. G.L. c. 94B, §§1, 2 and 8 to ban and require repurchase of UFFI. The statute defines a "banned hazardous substance" as a product which "may cause substantial personal injury or substantial illness . . .". B.D. 1. Obviously the prevention of substantial personal injuries and illnesses is a legitimate state interest.

long as "the question is at least debatable," the state's action must be upheld. Id.; United States v. Carolene Products Co., 304 U.S. 144, 154 (1938).

Here, the rationality of the UFFI regulation as a means of protecting the public health is clear on the face of the opinion below. See B.A.23-28. The Court held that the industry had failed to demonstrate on the nineteen day trial record that the UFFI regulation lacked a rational basis. It concluded that "there was evidence before the judge indicating that UFFI would potentially in some conditions emit formaldehyde into houses at levels above which at least a significant portion of the population would experience adverse health effects". B.A.25 (footnote omitted). The industry quarrels with that summary of the evidence, but cannot deny that the court below

found "evidence . . . which warranted the Commissioner's action . . ." as a rational means of protecting the public health. B.A.23.[8/] Since the rationality of the UFFI regulation is "at least debatable", Cloverleaf teaches that the Supreme Judicial Court properly resisted the suggestion to substitute its judgment for that of the Commissioner.

II. THE UFFI REGULATION IS NOT AN UNCONSTITUTIONAL INTERFERENCE WITH INTERSTATE COMMERCE.

C.P. Chemical seeks review on the grounds that the UFFI regulation

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8/ The court distinguished the rational basis and conceivable basis tests and found that the record here met the stricter rational basis test. B.A.23, 27-28. The industry thus errs in suggesting this case presents any issue about the use of the conceivable basis test. Cf. U.S. Retirement Board v. Fritz, 449 U.S. 166, 180 (1980) (Stevens, J., dissenting).

interferes with interstate commerce. It has waived that argument, and also has failed to show how, on the record before this Court, it could possibly evaluate that claim.

The first point is dispositive. The court below did not consider any Commerce Clause claim. The portions of the trial court decision the industry has filed with the court show no indication that that court ever decided that issue. The Commerce Clause claim thus "was not passed on" below and so is not properly before this Court. Supreme Court Rule 16.1(b); Cardinale v. Louisiana, 394 U.S. 437 (1969). The Commerce Clause appeal should thus be dismissed.

Even if that claim's merits were entitled to consideration, cursory examination shows its fatal defects. C.P. Chemical offers this Court no quantification

of the actual effect of the ban on it or on the interstate trade in UFFI and indeed offered no such evidence below. It claims the ban on UFFI "had a devastating effect on C.P. Chemical's business in the state of Massachusetts and in other states." Of course, the ban on sales of UFFI in Massachusetts "devastated" the UFFI business in Massachusetts; that is the point of a ban. The argument is only a restatement of the ban's existence, not a demonstration of its effect. The total absence of any discussion of the ban's practical effect beyond Massachusetts' borders is fatal to the Commerce Clause claim.

The Court has emphasized the need to focus on the record actually before it to determine whether state action has an impermissible burden on interstate com-

merce. In Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978), the Court declined to rely upon "speculative concerns", id. at 280, and noted that the record "did not establish the essential factual predicate." Id. at 276 (emphasis supplied). Similarly, in Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 447, n.25 (1978), the Court observed that "Here, as in many other fields, constitutionality is conditioned upon the facts . . ." Those "essential" facts are missing here and so the constitutional question cannot be resolved. C.P. Chemical's effort to persuade the Court to attempt that futile task should be disregarded.

## III. THE UFFI REGULATION DOES NOT DENY THE INDUSTRY DUE PROCESS.

### A. The UFFI Regulation Does Not Deprive C.P. Chemical Of Its "Liberty" Without Due Process Of Law.

C.P. Chemical raises an issue that has not been taken seriously for over a half century. It contends that it, a business corporation, has a liberty interest in selling UFFI in Massachusetts and that it cannot be deprived of that liberty interest without a prior adjudicatory hearing. Its argument is frivolous.

Even assuming that a business corporation can have a constitutionally protected liberty interest,[9/] that

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9/ See Hague v. CIO, 307 U.S. 496, 527 (1939) (Stone, J., concurring) (the liberty protected by the Fourteenth Amendment is that of natural, not artificial, persons); but see First National Bank v. Bellotti, 435 U.S. 765 (1978) (corporations have some protected liberty rights but not "purely personal" ones).

interest is no greater than that of any other person wishing to do business in Massachusetts. It is quite clear that a state can pass general statutes restricting or even prohibiting particular forms of commercial enterprise without giving each affected business a prior adjudicatory hearing. See New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96, 106-07 (1978); Nebbia v. New York, 291 U.S. 502, 528 (1934). As the Court noted in Orrin W. Fox, supra at 107:

> [T]he due process clause is [not] to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare." quoting Lincoln Union v. Northwestern Co., 335 U.S. 525, 536-37 (1949).
>
> "[Therefore], [o]nce having enacted a reasonable general

> scheme of business regulation,10/ [Massachusetts] was not required to provide for a prior individualized hearing each and every time the provisions of the Act [affected business operations]."
>
> Id. at 108.

See also Bi-Metallic Investment Co. v. Colorado, 239 U.S. 441, 445 (1915). Thus, even if C.P. Chemical has a "liberty" right to sell a product which releases hazardous vapors into homes, deprivation of that right was accomplished by due process of law. The "legislative process" by which the Commonwealth banned that product "provides all the process that is due . . ." Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982).

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10/ As the Hazardous Substances Labelling Act certainly is.

B. The UFFI Ban Is Not Unconstitutionally Retroactive.

Although not raised as a separate issue, a common thread running through the industry's briefs is the claim that the UFFI regulations are retroactive.[11/] That argument focuses on the wrong date.

The appropriate date is July 1, 1961, when Mass. G.L. c. 94B took effect. See Mass. St. 1960, c. 27, §3. Since then all corporations doing business in Massachusetts are on notice that products they sell are subject to being found to be hazardous substances, being banned from commerce, and being made the subject of a repurchase order. The UFFI industry, which began in this country in 1974

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11/ Civil retroactivity is not unconstitutional per se, Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15-16 (1976), which explains why this theme is subliminal rather than dominant.

(B.A.6) entered Massachusetts knowing it faced the exact risk it now complains of. See New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. at 105 (statute, not a later administrative notice issued under it, curtailed plaintiff's asserted right).

C. The Regulation Did Not Deprive The Industry Of Property Without Due Process of Law.

The industry focuses on only one part of the administrative action and ignores the settled rules for constitutional review of such actions. Once those well-known rules are brought into play, and once the functional nature of the UFFI regulation is considered, the industry's due process claims can be quickly disposed of.

The first point is vital. This case involves pure economic regulation; no personal or fundamental constitutional

rights are at stake. The "legislative judgment on economic and business matters is 'well-nigh conclusive' . . ." Poe v. Ullman, 367 U.S. 497, 518 (1961) (Douglas, J.) quoting in part Berman v. Parker, 348 U.S. 26, 32 (1954).12/ Thus we deal here with matters largely committed to the state, a result which colors the industry's claims.

Second, the focus should be on the entire UFFI regulation, rather than just the repurchase provision. The UFFI

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12/ The states retain the "sovereign right" to exercise their police power to protect their citizens' "vital interests" and this Court has said it "must respect the wide discretion on the part of the legislature in determining what is and what is not necessary." El Paso v. Simmons, 379 U.S. 497, 508-09 (1965) (citation omitted). "It is now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality . . ." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976); Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

regulation represented a clear state[13/] decision to protect its citizens from the risks of formaldehyde exposure that might result from UFFI installation. As contemplated by Chapter 94B, the principal means of accomplishing this goal was a total, prospective ban on future installation of UFFI in the Commonwealth. As also contemplated by the statute, that ban was coupled with a limited repurchase requirement establishing a procedure by which individuals living in UFFI

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13/ It makes no constitutional difference that the decision to ban UFFI here was made by an administrative agency rather than by the legislature. As this Court recently noted: ". . . the states are free to allocate the lawmaking function to whatever branch of government they may choose [and the] standard of review under . . . rationality analysis [is] without regard to which branch of the state government has made the legislative choice . . ." Cloverleaf, 449 U.S. at 461 n.6.

insulated homes and suffering from the symptoms of acute formaldehyde exposure can seek to have that UFFI removed by the manufacturer. The UFFI regulation thus is a comprehensive effort to correct the potential and actual health risks associated with UFFI.

Therefore elementary principles of administrative law control this case. For seventy years this Court has recognized the dichotomy between rulemaking and adjudication and the need for prior formal hearings only in the latter. See United States v. Florida East Coast R. Co., 410 U.S. 224, 244-45 (1973). The fundamental difference is "between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." Id.; see also

3 K. Davis, Administrative Law Treatise, §14.2 at 7 (2d ed. 1980). Since the UFFI regulation is a broad policy decision, and since it incorporated no conclusions about specific past actions or particular actors, it "was clearly a rulemaking proceeding in its purest form" and so the Constitution did not require adjudicatory hearings. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 542 n.16 (1978).

The industry attempts to avoid this result by two arguments. It claims a hearing is required because the UFFI regulation imposes substantial costs upon it. That argument has been consistently rejected at least since Bi-Metallic. There Justice Holmes wrote that

> "[g]eneral statutes within the state power are passed that affect the person or property of individuals, sometimes to

> the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way they can be in a complex society, by their power, immediate or remote, over those who make the rule." 239 U.S. at 445. (Emphasis added).

This result has been consistently followed.[14/]

The industry's second tack is to argue that only a "relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds" and so each had a

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14/ See e.g. FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) (legislative-type rulemaking resulted in divestiture of highly valuable radio and television licenses for certain licensees); Bowles v. Willingham, 321 U.S. 503, 518 (1944) ("A member of the class which is regulated may suffer economic losses not shared by others. His property may lose utility and depreciate in value as a consequence of regulation. But that has never been a barrier to the exercise of the police power.").

right to a hearing. Bi-Metallic, 239 U.S. supra at 446. The fallacy of that argument is that the industry is unable to identify who that "relatively small number" is and just what those "individual grounds" are. Presumably, the industry believes the affected class was limited to UFFI manufacturers.[15] But it offers no basis for believing that the number of manufacturers was so limited that an adjudicatory hearing format would have been feasible.[16] More

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15/ That is plainly wrong. In promulgating the UFFI regulation the Commissioner had to consider the interests of installers, distributors, and the consumers who had or might some day have UFFI in their homes. It is those consumers in whose interest the regulation was adopted and so they certainly had an "interest" in the rulemaking proceeding.

16/ The Formaldehyde Institute, a petitioner here, lists 62 members many of

(footnote continued)

importantly, the issues involved in the UFFI rulemaking[17] were simply not the type of"individual grounds" Justice Holmes had in mind. They were instead the "policy-type rules or standards" which are properly decided in rulemaking not adjudicatory proceedings. Florida East Coast R. Co., 410 U.S. at 224.[18]

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(footnote continued)

whom presumably are or were in the UFFI business. C.P. Chemical is not a member of the Institute. Finally, "NAUFIM" the UFFI industry trade association, does not include all industry members since, for example, Borden itself is not a NAUFIM member. The conclusion of the Superior Court that NAUFIM could represent the entire industry, B.C.16, was rejected by the Supreme Judicial Court. B.A.13, n.4.

17/ Those issues were the risk to public health resulting from possible formaldehyde emissions from UFFI and the possibility of corrective or ameliorative measures. B.A.21-23.

18/ See also Anaconda Co. v. Ruckelshaus, 482 F.2d 1301, 1036-07 (10th Cir. 1973)

(footnote continued)

Since those broad "legislative" facts were the sole questions before the Commissioner, no adjudicatory hearing was constitutionally required.[19]

Considerations of practicality and effectiveness are also relevant in considering whether due process requires a hearing in connection with administrative action. Mathews v. Eldridge, 424 U.S.

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(footnote continued)

(even though regulation affected only one company, no due process right to an adjudicatory hearing); Law Motor Freight v. CAB, 364 F.2d 139, 144 (1st Cir. 1966) (order affected only one company but no adjudicatory hearing required since the order could not be divorced from setting of future policy).

19/ "[P]rocedural due process has not been held to require that the affected individuals or groups be granted a hearing before government acts in a legislative, or broadly rule-making or policy-forming, capacity." L. Tribe, American Constitutional Law, §10-8 at 514 (1978).

319, 347 (1976).[20] Those factors support the conclusion that no hearing was required here.

Any effort by the Commissioner to hold an adjudicatory hearing would likely have been futile. The Superior Court trial consumed nineteen trial days. B.A. 10. An adjudicatory hearing would have been much longer since other affected manufacturers, other state agencies, and consumers themselves would have sought to participate.[21]

Furthermore, any hearing would have been futile. The Fourteenth Amendment gives rights only to persons and so the

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20/ See also O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 799-800 (Blackmun, J., concurring); Bowles v. Willingham, 321 U.S. 503, 519-20 (1944).

21/ It was concern for consumers that motivated the regulation and so they could hardly have been barred from participating.

rights protected by that amendment are personal. The logic of the industry's position is that each manufacturer of UFFI has a right to a hearing. Even if the Commissioner had managed to corral the entire UFFI industry into one hearing room and then issued a regulation, that regulation would, by the industry's logic, be ineffective against any new corporate "person" which subsequently entered the UFFI business. The industry's argument thus reduces to an absurdity since it would prevent any industry wide rulemaking. Justice Holmes saw that first.

> "Where a rule of conduct applies to more than a few people it is impractical that every one should have a direct voice in its adoption."

Bi-Metallic, 239 U.S. at 445. The "complex society" Justice Holmes referred to

in 1915 is far more complex now and the need for practical devices like rule-making has increased. Arguments that were out of date 70 years ago certainly do not warrant plenary review now.

D. State Law Did Not Require An Adjudicatory Hearing.

Borden makes (Pet. at 10-11) a passing reference to Mass. G.L. c. 94B as an independent source of entitlement to a hearing. Its argument is frivolous, particularly when made to this court.

Chapter 94B explicitly states that the Commissioner "may by reasonable rules and regulations" declare any substance to be hazardous and ban it from commerce. B.D. 2-3. It clearly contemplates regulatory, not adjudicatory, proceedings. Equally plainly, the Supreme Judicial Court, whose conclusion on state law

questions is final,[22] concluded unambiguously that there was no state law entitlement to an adjudicatory hearing. B.A.11-12. The industry thus claims a right to a hearing where none exists.

### E. If There Was A Right To A Hearing, The Superior Court Trial Adequately Served.

There is one final reason why plenary review is plainly not warranted here. Even if the industry were entitled to an adjudicatory hearing in connection with the UFFI regulation, it has already had, and lost, that hearing. The industry challenged the UFFI regulation in a nineteen day trial with full presentation of witnesses and cross-examination. That trial was surely constitutionally adequate even in the industry's jaundiced eyes. It was on the basis of the trial

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22/ See e.g. Bishop v. Wood, 426 U.S. 341, 344 (1976).

record, not on the prior administrative record, that the state's highest court found the regulation rational. B.A.25. The industry has thus already received the hearing it seeks. Even if it prevailed on plenary review here, the outcome could only be a remand for a hearing, the results of which would be controlled by the state court's prior decision. This case is thus moot because the industry has already gotten all it seeks.

## CONCLUSION

The Court should dismiss C.P. Chemical's appeal and deny Borden's petition for certiorari.

Respectfully submitted,
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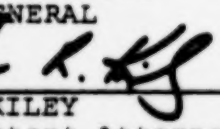

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